Supreme Court, U.S.
FILED

071346 APR 22 2008

OFFICE OF THE CLERK

No. _____

In The
Supreme Court of the United States

FEDERAL EXPRESS CORPORATION,
Petitioner,

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

PETITION FOR WRIT OF CERTIORARI

EDWARD J. EFKEMAN*
FEDERAL EXPRESS CORPORATION
LEGAL DEPARTMENT, LITIGATION
3620 HACKS CROSS ROAD
THIRD FLOOR, BUILDING B
MEMPHIS, TN 38125-8800
(901) 434-8555

* *Counsel of Record*

Counsel for Petitioner
Federal Express Corporation

April 22, 2008

Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

QUESTION PRESENTED

Whether the Fourth Circuit used an improper standard to allow punitive damages for a failure to make reasonable accommodations in violation of the Americans with Disabilities Act, 42 U.S.C. § 12112(b)(5)(A), when it required only that the employer (a) had a "rudimentary knowledge" of the statute and (b) failed to provide reasonable accommodations, without any evidence of the employer's culpable intent or state of mind.

PARTIES TO THE PROCEEDING

Pursuant to Rule 14.1(b), the following list identifies all of the parties appearing here and before the United States Court of Appeals for the Fourth Circuit.

The Petitioner here and appellant below is Federal Express Corporation (d/b/a FedEx Express).

The Respondent here is the Equal Employment Opportunity Commission.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6, Petitioner states as follows:

The parent company of Petitioner Federal Express Corporation (d/b/a/ FedEx Express) is FedEx Corporation, whose stock is publicly traded on the New York Stock Exchange under the symbol FDX.

TABLE OF CONTENTS

QUESTION PRESENTED i

PARTIES TO THE PROCEEDING ii

CORPORATE DISCLOSURE STATEMENT iii

TABLE OF CONTENTS iv

TABLE OF AUTHORITIES vii

OPINIONS BELOW 1

JURISDICTION 1

STATUTES INVOLVED 1

STATEMENT OF THE CASE 1

REASONS FOR GRANTING THE PETITION ... 7

I. THE COURTS OF APPEALS HAVE DIFFERENT STANDARDS FOR ALLOWING PUNITIVE DAMAGES IN SITUATIONS INVOLVING A FAILURE TO MAKE REASONABLE ACCOMMODATIONS IN VIOLATION OF THE ADA. 10

A. The Second, Seventh, and Eighth Circuits require evidence of "evil motive" or "reckless state of mind," consistent with the main tenets of *Kolstad*. 13

B. The Fourth and Tenth Circuits require only that the employer be familiar with the accommodation requirements of the ADA coupled with a finding of an ADA violation, and do not require evidence regarding the employer's intent. 17

C. Other courts, including those in the First, Third, and Fifth Circuits, have an unclear standard. 20

II. COURTS HAVE HAD AN OPPORTUNITY TO SETTLE THIS ISSUE SINCE *KOLSTAD* IN 1999, BUT CONTINUE TO HAVE DIVERGENT AND INCONSISTENT APPROACHES. 24

III. FEDERAL LAWSUITS RELATING TO THE ADA ARE INCREASING EVERY YEAR AND THE IMPOSITION OF PUNITIVE DAMAGES IN THOSE CASES IS AN IMPORTANT ISSUE OF FEDERAL LAW THAT THIS COURT SHOULD CLARIFY. 25

CONCLUSION 27

APPENDIX

Appendix A: Jan. 23, 2008 Fourth Circuit Opinion 1a

Appendix B: April 25, 2006 District Court Memorandum Opinion and Order 38a

Appendix C: Statutes and Regulations

42 U.S.C. § 12111 ..... 44a
42 U.S.C. § 12112 ..... 47a
42 U.S.C. § 12117 ..... 52a
29 C.F.R. § 1630.2 ..... 53a

TABLE OF AUTHORITIES

CASES

Anderson v. G.D.C., Inc.,
281 F.3d 452 (4th Cir. 2002) 17

Deters v. Equifax Credit Info. Servs.,
202 F.3d 1262 (10th Cir. 2000) 14

EEOC v. E.I. DuPont de Nemours & Co.,
480 F.3d 724 (5th Cir. 2007) 20, 21, 25

EEOC v. Heartway Corp.,
466 F.3d 1156 (10th Cir. 2006) 18

EEOC v. Wal-Mart Stores, Inc.,
187 F.3d 1241 (10th Cir. 1999) 23, 24

Gagliardo v. Connaught Labs.,
311 F.3d 565 (3d Cir. 2002) 21, 24

Gile v. United Airlines, Inc.,
213 F.3d 365 (7th Cir. 2000) 13, 15, 24

Kolstad v. American Dental Association,
527 U.S. 526, 119 S. Ct. 2118,
144 L. Ed. 2d 494 (1999) ..... *passim*

Marcano-Rivera v. Pueblo Int'l, Inc.,
232 F.3d 245 (1st Cir. 2000) 24

Pacific Mut. Life Ins. Co. v. Haslip,
499 U.S. 1 (1991) 20, 27

Smith v. Wade, 461 U.S. 30 (1983) 11, 22

Sprague v. United Airlines, Inc., No. 97-12102-GAO, 2002 U.S. Dist. LEXIS 14519 (Aug. 7, 2002) . 22

Sturgill v. United Parcel Service, Inc., 512 F.3d 1024 (8th Cir. 2008) 15, 16, 25

Toro Cotto v. Liga Puertorriquena Contra El Cancer, No. 04-1285 (HL), 2007 U.S. Dist. LEXIS 10434 (D.P.R. Feb. 14, 2007) 22

Weissman v. Dawn Joy Fashions, Inc., 214 F.3d 224 (2d Cir. 2000) 15, 24

STATUTES

28 U.S.C. § 1254(1) 1

28 U.S.C. § 1331 1

42 U.S.C. § 1981a 8

42 U.S.C. § 1981a(b)(1) 11

42 U.S.C. § 12101, *et seq.* 1

42 U.S.C. § 12112(b)(5)(A) 12

REGULATIONS

29 C.F.R. § 1630.2 12

29 C.F.R. § 1630.2(o)(3) 12

29 C.F.R. § 1630.2(p)(1) 12

RULES

Sup. Ct. R. 10(a) 7

Sup. Ct. R. 10(c) 8

OTHER AUTHORITIES

Moss, K., et al., *Prevalence and Outcomes of ADA Employment Discrimination Claims in the Federal Courts*, Mental & Phys. Disability L. Rptr., Vol. 29, p. 303 (May/June 2005) 26

U.S. Equal Employment Opportunity Commission, Americans with Disabilities Act of 1990 (ADA) Charges FY1997-FY2007, http://www.eeoc.gov/stats/ada-charges.html (last visited April 18, 2008) ... 26

OPINIONS BELOW

The opinion of the Court of Appeals for the Fourth Circuit is reported at 513 F.3d 360, and is reprinted in the Appendix to the Petition ("Pet. App.") at 1a–37a. The District Court's opinion is not reported, but is available at 2006 U.S. Dist. Lexis 23062, and is reprinted at Pet. App. 38a–43a.

JURISDICTION

The Court of Appeals for the Fourth Circuit issued its opinion on January 23, 2008. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

This case involves provisions of the Americans with Disabilities Act, 42 U.S.C. § 12101 *et seq*. The pertinent provisions are reproduced at Pet. App. 44a-53a.

STATEMENT OF THE CASE

District court jurisdiction. The court of first instance, the United States District Court for the District of Maryland, had jurisdiction of this matter pursuant to 28 U.S.C. § 1331.

Factual Background. The Complaint filed by Respondent U.S. Equal Employment Opportunity Commission ("EEOC") alleged that Petitioner Federal Express Corporation ("FedEx") violated the Americans with Disabilities Act (ADA) with respect to a deaf FedEx employee, Ronald Lockhart. The Complaint

alleged that FedEx (a) failed to provide Lockhart reasonable accommodations for his disability during the course of his employment and (b) retaliated against Lockhart by terminating his employment.

FedEx denied these allegations, contending (a) that it had provided reasonable accommodations to Lockhart that enabled him to perform his job satisfactorily and to enjoy equally the benefits and privileges of his employment and (b) that Lockhart was terminated for a well-documented chronic absenteeism problem, and not for any reason related to his requests for accommodation.

The matter was tried to a jury in Baltimore, Maryland, beginning February 27, 2006. Over four days, live testimony was given by Lockhart, two of his managers at the local FedEx facility, two hourly co-workers of Lockhart, the interpreter retained by FedEx, and the EEOC's economic damages expert. In addition, videotape testimony was shown from a deposition of a FedEx-retained interpreter from one of its Ohio facilities.

The evidence at trial showed that Ronald Lockhart has been deaf since birth. FedEx hired Lockhart at its Baltimore-Washington International Airport facility ("BWI Ramp") in March 2000 as a package handler. As a package handler at the BWI Ramp, Lockhart took packages arriving from trucks or airplanes, separated and sorted them, and loaded them onto other trucks or airplanes.

Lockhart was the first deaf employee that his immediate supervisor, Vic Cofield, had supervised.

Cofield called someone at a separate location—he could not remember the title or the name of the department—and asked him what reasonable accommodations meant, and talked to him about some of the things he needed to do. Cofield's supervisor, Patrick Hanratty, was familiar with the Americans with Disabilities Act, and knew that reasonable accommodations would be required. FedEx has a corporate policy in its People Manual (a personnel policy and procedure manual) under which it takes affirmative action to employ and advance in employment qualified disabled individuals and to avoid discrimination based on any disability. Both Hanratty and Cofield conceded, however, that they did not specifically read the FedEx policy at the time Lockhart was hired.

Nevertheless, Cofield made changes to accommodate Lockhart, some of which were made before Lockhart could request them. Cofield noticed that the monthly videos shown to the employees were not closed-captioned, and he arranged for closed-captioned tapes from FedEx corporate headquarters. Cofield did this without being requested to do so by Lockhart. Cofield further noticed another hourly employee at the BWI Ramp communicating with Lockhart. He found out that this coworker had learned sign language as a child from his mother, and Cofield asked that coworker's manager if the coworker could help interpret with Lockhart on some occasions. The coworker interpreted a few times for them, until Lockhart said that he was not comfortable with the situation.

After Lockhart told Cofield that he was not comfortable with the coworker's signing, Cofield sought the services of a professional interpreter. Cofield talked to a senior manager at the FedEx facility at Dulles International Airport and got the name of an independent professional interpreter they were using there. The professional interpreter started providing professional interpretation services at the BWI Ramp in January 2002. From that time until the end of Lockhart's employment a year later in January 2003, the professional interpreter came to the BWI Ramp 19 times.

Lockhart and Cofield communicated using written notes during the entire time of Lockhart's employment. Lockhart's parents were not deaf and do not know sign language, and he communicated with them by writing on paper since he was small. Lockhart never indicated that he had a problem with the procedure of writing notes back and forth.

Lockhart was generally a good worker and received satisfactory performance reviews. He did not receive any warnings for safety violations or conduct. Like any other employee of FedEx, Lockhart had different benefit programs available to him, and he took advantage of them. As an airline, FedEx has interline agreements with other airlines to provide discounted airline tickets to its employees for their personal use. Lockhart understood the program and took advantage of it on more than one occasion, without the assistance of an interpreter. Lockhart also took advantage of the FedEx employee program related to tuition reimbursement, where an employee attends higher education classes and FedEx reimburses the employee

for tuition expenses. Lockhart was one of three employees at the BWI Ramp who took advantage of this program. Cofield—who was also utilizing the program—helped Lockhart with his paperwork, including calling the registration office at the University of Maryland to obtain the required papers, and Cofield himself submitted Lockhart's receipts to FedEx so that he could meet the requirements of the FedEx program.

The employees at the BWI Ramp were required to attend periodic meetings, some daily. At the daily meetings, lasting ten minutes at most, there was a quick headcount, then a period of physical stretching, and then announcements of any pertinent information for that day, such as late incoming trucks, problems from the past day, or upcoming holidays. At first, Cofield went to Lockhart and told him of any information that related to him. Later, Cofield provided written notes of the contents of the daily meetings. Lockhart never told Cofield that he did not understand something from a daily meeting. Monthly meetings also occurred, lasting approximately 30 minutes, with a short videotape from corporate headquarters—closed-captioned for at least some of Lockhart's employment—and other information similar to the daily meetings. Cofield also took Lockhart aside for these meetings to give him the information he needed or included it on a written document given to Lockhart.

At the close of the EEOC's case, FedEx moved for judgment as a matter of law on all claims, and in particular on the issue of punitive damages. FedEx argued that the evidence in plaintiff's case-in-chief was

insufficient to support a finding of malice or reckless indifference. The motion was denied, and then renewed and denied at the close of the defendant's case. FedEx objected to the punitive damages instruction for the same reasons, but the district court gave the instruction to the jury over defendant's objection.

The EEOC argued to the jury that the accommodations provided to Lockhart were inadequate, and that FedEx delayed in providing reasonable accommodations. It further argued that FedEx had terminated Lockhart not because of his absenteeism, but because Lockhart had filed an EEOC charge complaining of inadequate accommodations. The jury returned a verdict for the defendant on the issue of retaliation, finding FedEx did not discriminate against Lockhart when it terminated his employment. The jury found that FedEx had failed to provide reasonable accommodations to Lockhart, and awarded compensatory damages in the amount of $8,000. The jury further awarded $100,000 in punitive damages on that claim.

FedEx filed a Motion for Judgment as a Matter of Law as to Punitive Damages or, in the Alternative, for Remittitur. The basis for the motion was that the evidence at trial was insufficient as a matter of law to sustain an award of punitive damages because no evidence existed from which the jury could infer intentional acts of discrimination committed with malice or reckless indifference. FedEx alternatively requested that, if the motion for judgment as a matter of law were denied, the punitive damages be remitted to an amount that did not exceed a constitutionally

permissible level. The finding of liability for failure to provide reasonable accommodations and the award of compensatory damages were not the subject of any post-trial motions. Both motions were denied by an unpublished Memorandum Opinion. Pet. App. 38a-43a.

Petitioner appealed the issue of punitive damages to the Court of Appeals for the Fourth Circuit. On appeal, the Fourth Circuit affirmed the district court's refusal to set aside or remit the punitive damages. Pet. App. 1a. The court indicated that either malice or reckless indifference is necessary, and that "the evidence must only have been sufficient to prove reckless indifference," so it focused its analysis on that issue. Pet. App. 22a, n.9. The court addressed many of the facts recited above, and concluded that "a managerial official of FedEx perceived the risk that his failure to provide Lockhart with reasonable accommodations would contravene the ADA." Pet. App. 27a. It therefore affirmed the award of punitive damages.

REASONS FOR GRANTING THE PETITION

This case presents a narrow but important question relating to the standard under which punitive damages may be imposed on an employer for the failure to provide reasonable accommodations under the Americans with Disabilities Act (ADA). The standard applied below by the Court of Appeals for the Fourth Circuit is in conflict with several other courts of appeals, *see* S. Ct. R. 10(a), and is inconsistent with the general principles set forth in *Kolstad v. American Dental Association*, 527 U.S. 526 (1999). *See* S. Ct. R.

10(c). This Court should grant certiorari review to resolve this marked discrepancy between the circuits and to provide clear guidance to those courts of appeals where the issue has not been addressed.

In *Kolstad* the Court explained the circumstances that would warrant punitive damages in Title VII discrimination cases generally. Relying on "congressional intent to authorize punitive awards to only a subset of cases involving intentional discrimination," the Court reaffirmed the two-tiered structure present in 42 U.S.C. § 1981a and the "higher standard that a plaintiff must satisfy to qualify for a punitive damages award." *Kolstad*, 527 U.S. at 534. The Court refocused the inquiry at the punitive damages stage away from the nature of the conduct and towards the employer's state of mind, including the "evil intent of the defendant" or the "bad motive of the wrong-doer." *Id.* at 538.

Relief for discrimination claims under the ADA mimics relief available under Title VII, and therefore courts understandably look to *Kolstad* for guidance in ADA cases. Yet courts have not interpreted *Kolstad* consistently with respect to the ADA, and in particular with respect to cases involving failures to make reasonable accommodations. Indeed, the various appellate courts that have encountered this issue have taken increasingly divergent approaches since 1999, and in those circuits where the issue has not been directly addressed, the district courts continue to take unpredictable paths.

The decision of the Fourth Circuit below conflicts with holdings of other courts of appeal, including an

opinion from the Eighth Circuit handed down in the very same month. Moreover, the Fourth Circuit's opinion is inconsistent with the principles of *Kolstad*, because it ignores the employer's state of mind. The Fourth Circuit excises from *Kolstad* the only sentence that restates the reckless indifference standard as "an employer must at least discriminate in the face of a perceived risk that its actions will violate federal law to be liable in punitive damages," *id.* at 536, and dismisses the remainder of the opinion. Under the Fourth Circuit's formulation—also followed by the Tenth Circuit—the employer's intent and motive become completely irrelevant to the inquiry, and the evidence need show only that (a) the employer was aware of its obligations under the ADA and (b) it failed to meet those obligations.

As set forth in greater detail below, this standard does not comport with the rationale or spirit of *Kolstad*. Applying this "perceived risk" standard will not limit punitive damages to a narrow subset of discrimination cases, but rather will allow the issue to go automatically to the jury in every ADA case involving the interactive process, regardless of the employer's state of mind in attempting to comply with its obligations. Subjecting employers to the "perceived risk" standard in this context discourages efforts to comply with the ADA, because facts about an employer's efforts to educate itself about reasonable accommodations required under the ADA or its participation in a meaningful interactive process are the very facts that allow punitive damages to be considered by a jury. That illogical result runs completely contrary to the principles underpinning *Kolstad* and the culpable state of mind required to

impose punitive damages. Allowing the opinion below to stand without providing clear guidance on this issue will only foster continued division among the circuits, and will further erode the main principles emphasized in *Kolstad*.

I. THE COURTS OF APPEALS HAVE DIFFERENT STANDARDS FOR ALLOWING PUNITIVE DAMAGES IN SITUATIONS INVOLVING A FAILURE TO MAKE REASONABLE ACCOMMODATIONS IN VIOLATION OF THE ADA.

In 1999 the Court considered *Kolstad v. American Dental Association*, 527 U.S. 526 (1999), to determine the circumstances under which punitive damages could be awarded under Title VII. An *en banc* majority of a divided Circuit Court for the District of Columbia had held that some "egregious" conduct was required to qualify for punitive damages. The Supreme Court rejected the "egregious" nature element, but affirmed the concept of two separate standards for imposing punitive damages in discrimination cases: "one for establishing a right to compensatory damages and another, higher standard that a plaintiff must satisfy to qualify for a punitive award." *Kolstad*, 527 U.S. at 534. The rationale for this two-tiered structure was to give effect to Congress' intent to "narrow the class of cases for which punitive damages are available to a subset of those involving intentional discrimination." *Id.* at 535.

Explaining the second, higher standard, the Court focused not on the nature of the acts, but on the actor's state of mind. The statute that authorizes punitive

damages for Title VII claims—and likewise for ADA claims—provides that the employer must act with "malice or with reckless indifference to the federally protected rights of an aggrieved individual." 42 U.S.C. § 1981a(b)(1). The Court noted that § 1981a was enacted after its 1983 decision of *Smith v. Wade*, and that Congress may have borrowed its language from that opinion. According to *Smith*, "a jury may be permitted to assess punitive damages ... when the defendant's conduct is shown to be motivated by evil motive or intent, or when it involves reckless or callous indifference to the federally protected rights of others." *Smith v. Wade*, 461 U.S. 30, 56 (1983); *see Kolstad*, 527 U.S. at 536. After reviewing the various phrases used to describe the requisite state of mind, including "'subjective consciousness' of a risk of injury or illegality," "criminal indifference to civil obligations," "wantonness," and "conscious indifference to consequences," the Court announced the standard in the context of § 1981a: "an employer must at least discriminate in the face of a perceived risk that its actions will violate federal law to be liable in punitive damages." *Id.* at 536.

This "perceived risk" standard applies satisfactorily to most cases brought under Title VII or the ADA in which the plaintiff alleges intentional discrimination. When an employee is harassed, fired, demoted, or treated differently from other employees in the workplace, it is a straightforward analysis to ask whether the employer took the illegal discriminatory acts in the face of a perceived risk that it would violate federal law. Application of the "perceived risk" standard is not straightforward, however, in the context of allegations that the employer failed to make

reasonable accommodations to a qualified employee. To determine what reasonable accommodations may be, the Code of Federal Regulations states that it may be necessary for an employer "to initiate an informal, interactive process" with the employee to "identify the precise limitations resulting from the disability and potential reasonable accommodations that could overcome those limitations." 29 C.F.R. § 1630.2(o)(3). This interactive, back-and-forth process of identifying limitations and "potential" accommodations necessarily implies some trial and error both for the employer and the employee to discover the reasonable accommodation that allow, on one hand, the employee to perform his job functions and enjoy the rights of privileges of other employees, and on the other hand, do not constitute an undue hardship on the employer's finances and operations. *See* 29 C.F.R. § 1630.2(o and p). Because the employer is permitted to weigh "significant difficulty or expense," 29 C.F.R. § 1630.2(p)(1), the employer can legally deny an employee's request or offer accommodations that vary from those requested by the employee, as long as they ultimately satisfy the employee's needs.

In making this decision within the bounds of the interactive process, the employer would by definition be acting with a knowledge of its obligations under federal law and actually attempting to meet those obligations. If a jury were to later conclude that the accommodations offered by the employer were insufficient, the employer would nevertheless have violated the ADA by failing to make reasonable accommodations. *See* 42 U.S.C. § 12112(b)(5)(A). Under the "perceived risk" standard, punitive damages would automatically go to the jury in every ADA case

involving the interactive process, regardless of the employer's state of mind in attempting to comply with its obligations. Employers face the impossible choice between keeping their managers ignorant of the ADA—exposing themselves to greater potential liability while failing to serve their employees—and educating their managers about the ADA's obligations—consequently providing the court with the necessary evidence to allow a jury to consider punitive damages. *Kolstad's* "perceived risk" language could not have been intended to have this effect.

A. The Second, Seventh, and Eighth Circuits require evidence of "evil motive" or "reckless state of mind," consistent with the main tenets of *Kolstad.*

Most of the courts of appeals that have faced this issue after *Kolstad* do not rigidly apply the "perceived risk" standard, but instead interpret that language within the larger context of *Kolstad's* discussion of the employer's state of mind. Soon after *Kolstad* was decided, the Seventh Circuit heard a case in which an employee with depression and anxiety disorders requested a transfer to a different shift and the employer denied that request and offered no other reasonable accommodation. *Gile v. United Airlines, Inc.*, 213 F.3d 365 (7th Cir. 2000). The Seventh Circuit found that the evidence was sufficient for the jury to find that the employer had failed its ADA obligation, *see id.* at 373 (the employer "flunked its obligations under the ADA"), but found further that the employer "did not act with reckless disregard for [the employee's] ADA rights." *Id.* at 375. The court explained:

It is clear that McGuffin [employer's regional medical director] and Gile's floor supervisors knew of the ADA and United's reasonable accommodation policy, but United did not act with reckless disregard for Gile's ADA rights. Gile's supervisors deferred to McGuffin's evaluation, and McGuffin believed that a shift transfer would not have accommodated Gile's disability. McGuffin in good faith disagreed with Orlandino [employee's psychotherapist] that a shift transfer would enable Gile to work and believed that Gile's psychological condition was a nonoccupational, personal problem which did not trigger any obligation under the ADA on United's part. Punitive damages depend not on the egregiousness of the defendant's misconduct, or its callousness in denying reasonable accommodation, but instead run from a culpable state of mind regarding whether that denial of accommodation violates federal law. *See Kolstad*, 119 S. Ct. at 2124; *see also Deters v. Equifax Credit Info. Servs.*, 202 F.3d 1262, 1269 (10th Cir. 2000). United's failure to accommodate Gile's disability amounted to negligence because it misunderstood Gile's difficulties, did not regard her condition a disability and neglected to pursue Gile in developing an alternative accommodation. Although United wrongly believed that Gile was not disabled under the ADA and did not adequately address her accommodation request, United did not exhibit the requisite reckless state of mind regarding whether its treatment of Gile violated the ADA.

Id. at 375-76. The Seventh Circuit refused to permit punitive damages to go to the jury based on nothing more than a combination of a failure to accommodate under the ADA and the employer's awareness of its ADA obligations.

The Second Circuit reached a similar conclusion applying similar rationale. In *Weissman v. Dawn Joy Fashions, Inc.*, 214 F.3d 224 (2d Cir. 2000), the Second Circuit found sufficient evidence for a violation of the ADA, but reversed the jury's award of punitive damages. Discussing the "perceived risk" standard set forth by *Kolstad*, the court nevertheless reviewed the record for evidence of the "requisite 'evil motive,'" *id.* at 236, but found none to warrant punitive damages. To the contrary, the court noted that the employer had contacted counsel before denying the employee's request for more time off, an act clearly inconsistent with "reckless disregard" for the employee's rights. *Id.* at 236.

Earlier this year and a week before the Fourth Circuit issued the decision below, the Eighth Circuit decided a case consistent with the Seventh and Second Circuit's decisions in *Gile* and *Wiessman*, and directly contrary to the Fourth Circuit's holding. In *Sturgill v. United Parcel Service, Inc.*, 512 F.3d 1024 (8th Cir. 2008), the Eighth Circuit reviewed a Title VII case that related to a request by an employee for a religious accommodation. The court upheld the compensatory award for UPS's failure to accommodate its employee's sincerely held and properly communicated religious beliefs, but reversed the jury's award of punitive damages. Specifically, the court found that:

> No UPS employee was shown to have acted with malice or reckless indifference to Sturgill's accommodation request. The district and regional managers concluded, after consulting a union representative, that Sturgill's suggested accommodations would violate the CBA or disrupt UPS operations. Accordingly, they denied his request and suggested he use his seniority to bid on a combination job when available. ... The jury reasonably found that the lack of communication between the local managers and the Title VII decision-makers resulted in a failure to reasonably accommodate Sturgill's religion on December 17, but this is nothing more than violation of a Title VII negligence standard.

Id. at 1035. Like the Seventh and Second Circuits, the Eighth Circuit rejects the notion that a mere awareness of obligations under federal law coupled with a jury's finding of a violation automatically results in the availability of punitive damages.

The collective conclusion of these courts of appeals is consistent with the main principles of *Kolstad*: the employer's state of mind is determinative of potential punitive damages. It is also consistent with the idea of a second, more exacting standard for the imposition of punitive damages that Congress intended and that *Kolstad* explicitly endorsed. It is not consistent, however, with the decisions coming from other courts of appeals, including those in the Fourth and Tenth Circuits.

B. The Fourth and Tenth Circuits require only that the employer be familiar with the accommodation requirements of the ADA coupled with a finding of an ADA violation, and do not require evidence regarding the employer's intent.

In this case, the Fourth Circuit reviewed the issue of punitive damages on the standard that "[a] showing of reckless indifference required proof that a FedEx managerial official failed to accommodate Lockhart in the face of a perceived risk that such a failure would violate the ADA. *See Kolstad*, 527 U.S. at 536." *EEOC v. Federal Express Corporation*, 513 F.3d 360, 372 (4th. Cir. 2008) (Pet. App. 23a-24a). According to the Fourth Circuit's past holdings, a finding of a "perceived risk" only requires that an employer have "'at least a rudimentary knowledge' of the import of a federal anti-discrimination statute." *Id.* at 372-73 (Pet. App. 24a) (quoting *Anderson v. G.D.C., Inc.*, 281 F.3d 452, 460 (4th Cir. 2002)). In the instant case, this knowledge was not disputed. As the court noted, Lockhart's manager had, in addition to the various accommodations he made for Lockhart, "contacted other FedEx officials, including Connors in FedEx's 'corporate headquarters,' an unnamed official in FedEx's legal department, and Arrington (Senior Personnel Representative for the FedEx-BWI Ramp) seeking clarification on what might constitute reasonable ADA accommodations for Lockhart." *Id.* at 374 (Pet. App. 26a-27a). FedEx had knowledge of its obligations under the ADA. The jury found, however, that the actions of FedEx and its managers were insufficient to constitute reasonable accommodations and awarded $8,000 in compensatory damages.

These two facts—the knowledge of FedEx of its ADA obligations and the jury's finding of liability—were the only factors that the Fourth Circuit required to warrant punitive damages. Specifically, the court held that "a managerial official of FedEx perceived the risk that his failure to provide Lockhart with reasonable accommodations would contravene the ADA [and therefore] the jury was entitled to find that FedEx had acted, in *Kolstad*'s terms, with 'recklessness in the subjective form.'" *Id.* at 374 (Pet. App. 27a).

The Fourth Circuit's decision is not a complete anomaly in the federal court system. The Tenth Circuit has issued opinions with a similarly low punitive damage threshold. In *EEOC v. Heartway Corp.*, 466 F.3d 1156 (10th Cir. 2006), the Tenth Circuit clearly announced its own two-part test for allowing punitive damages to go to the jury: "where (1) there is sufficient evidence for the jury to decide whether an employee intentionally and illegally discriminated on the basis of a disability and (2) there is evidence that the employer knew the requirements of the ADA." *Id.* at 1168. In that case, the testimony of a manager that he "knew his obligations under the ADA" was adequate to send the issue of punitive damages to the jury with the underlying claim.

The diminished standard that the Fourth and Tenth Circuits have developed from *Kolstad's* "perceived risk" standard is not consistent with the larger holding of *Kolstad*. At oral argument in *Kolstad*, the Court questioned whether the parties were proposing that every case of intentional discrimination go to the jury on the question of

punitive damages. *See, e.g.*, Oral Arg. Tr. 2 (Justice O'Connor), 28-29 (Justice Breyer), 47 (Justice Kennedy). Counsel for the parties appeared to deny that every case would warrant allowing the jury to impose punitive damages. *See id.* The resulting opinion in *Kolstad*, with its approval of a second, higher standard, and its acknowledgement of Congress's intent to narrow punitive damages to a subset of intentional discrimination cases, also appeared to reject that theory. *Kolstad*, 527 U.S. at 534. The evolved standards of the Fourth and Tenth Circuits, however, effectively allow every case that survives summary judgment to go the jury with the issue of punitive damages still open. The potential exception would be the extremely unlikely case when an employer admits that it is unfamiliar with its ADA obligations—circumstances which seem to favor the imposition of punitive damages more than the cases where an informed employer uses negligent judgment. Paradoxically, an informed employer that makes substantial overt efforts to comply with its ADA obligations through the interactive process is punished when it negligently fails to comply, more so than an employer that remains ignorant of its obligations and makes no efforts to accommodate a disabled employee.

The basis for the Fourth and Tenth Circuits' rationale is the one sentence in *Kolstad* that uses the "perceived risk" language. Although the Court seems, in this sentence, to state explicitly a "standard," this is the only place in the opinion where that phrase is used. Even when discussing issues left on remand, the Court reverted back to the "malice or reckless indifference" wording without reference to the broader "standard" that an employer act "in the face of a

perceived risk" of violating federal law. *See Kolstad*, 527 U.S. at 546. Moreover, the author of the *Kolstad* majority opinion is the same Justice who wrote of punitive damages in an earlier opinion that "[w]hen awarded, they were reserved for the most reprehensible, outrageous, or insulting acts," *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 61 (1991) (O'Connor, J., dissenting), casting substantial doubt on an interpretation of *Kolstad* that makes punitive damages available to a far greater class of cases and for conduct that could amount to no more than simple negligence.

The standards of the Fourth and Tenth Circuits are in conflict with those of at least three other Circuits, and are inconsistent with the Supreme Court precedent whence they were derived. In this case, the infirm standard lowered the burden for punitive damages to the same standard as simple statutory liability, and the employer was impermissibly harmed.

C. Other courts, including those in the First, Third, and Fifth Circuits, have an unclear standard.

In addition to the clear circuit conflict outlined above, other courts of appeal have been unsuccessful in arriving at a succinct standard when faced with cases relating to failure to make reasonable accommodations. The Fifth Circuit in *EEOC v. E.I. DuPont de Nemours & Co.*, 480 F.3d 724 (5th Cir. 2007), restated the standard from *Kolstad* that the employer "'must at least discriminate in the face of a perceived risk that its actions will violate' the ADA." *Id.* at 732. The court then found that "DuPont was

aware of its responsibilities under the ADA." *Id.* at 733. While this finding would have been sufficient to send punitive damages to the jury under the Fourth and Tenth Circuit's formulation, the Fifth Circuit proceeded to enumerate misdeeds by the employer against the employee, including statements made about the employee's "crippled crooked self," and upheld punitive damages. *Id.* If evidence of misdeeds is required to support punitive damages, then the Fifth Circuit's rationale is at least closer to the holding of *Kolstad*, but the opinion is unclear on this issue.

Like the Fifth Circuit, the Third Circuit has also applied *Kolstad* to a failure to accommodate case with a literal restatement of the standard and additional facts. In *Gagliardo v. Connaught Labs.*, 311 F.3d 565 (3d Cir. 2002), after citing the "perceived risk" language, the court listed the evidence sufficient to support the jury's finding of reckless indifference. The facts included the extent of the employer's knowledge of the employee's disability, evidence that the employer had internal discussions about the employee's condition before her dismissal, and multiple requests by the employee for accommodations that the employer "refused to act on." *Id.* at 573. "In sum," the court concluded, "there was sufficient evidence to support the jury's award of punitive damages." *Id.* The recitation of the basic standard with a subsequent review of facts relating to the employer's state of mind calls into question whether the Third Circuit's approach is more like that of *Kolstad* and the Second, Seventh, and Eighth Circuits, or more like that of the Fourth and Tenth Circuits.

In the remaining circuits, the district courts have little to no guidance. For example, a district court in the First Circuit analyzed the issue:

> The Supreme Court went on to explain their decision in [*Smith v. Wade*, 461 U.S. 30], saying that while it is unnecessary to show actual malice in order to qualify for a punitive award, "recklessness in its subjective form" must be demonstrated. [*Kolstad*, 527 U.S. at 536]. Ultimately an employer "must at least discriminate in the face of a perceived risk that its actions will violate federal law to be liable in punitive damages." *Id.* There was ample evidence presented at trial to meet this standard. Defendants argue that they made a good faith effort to accommodate Plaintiff and that the steps they took preclude a finding of malice. This argument too falls short, as caselaw clearly indicates a showing of malice is not required.

Toro Cotto v. Liga Puertorriquena Contra El Cancer, No. 04-1285 (HL), 2007 U.S. Dist. LEXIS 10434, at *24 (D.P.R. Feb. 14, 2007). The district court appears to follow the strict reading of the Fourth and Tenth Circuits that once an employer is aware of the law and is found to have violated the statute, then punitive damages are automatically available. But another district court in the First Circuit required more than mere knowledge. In *Sprague v. United Airlines, Inc.*, No. 97-12102-GAO, 2002 U.S. Dist. LEXIS 14519, at *65 (Aug. 7, 2002), the district court included in its findings:

> 93. The Court further holds that Sprague is entitled to punitive damages because the actions of United in withdrawing the line mechanic job offer were done with the "knowledge that it may be acting in violation of federal law." *Kolstad v. American Dental Ass'n*, 527 U.S. 526, 535, 144 L. Ed. 2d 494, 119 S. Ct. 2118 (1999); *EEOC v. Wal-Mart Stores, Inc.*, 187 F.3d 1241, 1244-46 (10th Cir. 1999).
>
> 94. The absence of a bona fide belief that the refusal to hire Sprague was lawful is amply demonstrated by the shifting and serial justifications advanced by United. The refusal to engage Sprague in a genuine interactive process or to entertain with any degree of seriousness the possibility of reasonable accommodations to his disability warrant the imposition of punitive damages, which are awarded in the sum of $200,000.

The district court cited the Tenth Circuit's lower standard of mere knowledge, but it also cited to facts in the record that relate to the employer's culpable state of mind as shown through the "shifting and serial justifications." If it were following the Tenth Circuit's standard completely, evidence of a culpable state of mind is unnecessary.

These two cases from the First Circuit are particularly noteworthy because of the First Circuit's own prior rulings on this issue. A case from the First Circuit discusses punitive damages under the ADA, although it is not precisely applicable because the employer was found liable for the employee's

discriminatory firing in addition to a failure to accommodate her disability. Even in that case, however, the First Circuit could not find "any facts that would support an award of punitive damages under the principles announced in *Kolstad*," and it affirmed the district court's decision not to submit the issue to the jury at trial. *Marcano-Rivera v. Pueblo Int'l, Inc.*, 232 F.3d 245, 254 (1st Cir. 2000). Despite this holding, district courts within the First Circuit have no clear precedent to follow on the narrow but important issue of punitive damages in a failure to accommodate case. In addition to resolving the split in the circuits, all courts are in need of clarification of this issue.

II. COURTS HAVE HAD AN OPPORTUNITY TO SETTLE THIS ISSUE SINCE *KOLSTAD* IN 1999, BUT CONTINUE TO HAVE DIVERGENT AND INCONSISTENT APPROACHES.

Several courts of appeals applied *Kolstad* to failure to accommodate cases in the first few years after the opinion was issued. *See Marcano-Rivera v. Pueblo Int'l, Inc.*, 232 F.3d 245, 254 (1st Cir. 2000); *Weissman v. Dawn Joy Fashions, Inc.*, 214 F.3d 224 (2d Cir. 2000); *Gile v. United Airlines, Inc.*, 213 F.3d 365 (7th Cir. 2000); *EEOC v. Wal-Mart Stores, Inc.*, 187 F.3d 1241, 1244-46 (10th Cir. 1999). As discussed above, the conclusions of these courts varied, and in some cases contradicted each other. As time passed, the issue did not resolve itself, but continued to be unsettled. The Third Circuit's opinion in 2002 did not follow one path or the other, and in fact did not cite any other federal court of appeal. *See Gagliardo v. Connaught Labs.*, 311 F.3d 565, 572 (3d Cir. 2002).

Later in 2007, the Fifth Circuit's equally ambiguous opinion did not cite any other authority but *Kolstad* for support of its punitive damages standard. *See EEOC v. E.I. DuPont de Nemours & Co.*, 480 F.3d 724, 732-33 (5th Cir. 2007). Finally, in 2008, two separate courts of appeals decided cases with opposite holdings within a week of each other, both citing *Kolstad* for support. *Compare Sturgill v. United Parcel Service, Inc.*, 512 F.3d 1024, 1035 (8th Cir. 2008) *with EEOC v. Federal Express Corporation*, 513 F.3d 360, 372 (4th Cir. 2008).

This issue has had ample opportunity to percolate through the courts and resolve itself. In the decade since *Kolstad*, a uniform standard has not evolved for punitive damages in failure to accommodate cases. To the contrary, two factions have consistently followed divergent paths, and other courts of appeals do not appear to be choosing one path or the other, leaving their district courts without guidance on the issue. The issue is now ripe for this Court to resolve the circuit split and provide the needed guidance.

III. FEDERAL LAWSUITS RELATING TO THE ADA ARE INCREASING EVERY YEAR AND THE IMPOSITION OF PUNITIVE DAMAGES IN THOSE CASES IS AN IMPORTANT ISSUE OF FEDERAL LAW THAT THIS COURT SHOULD CLARIFY.

Although the question presented for the Court may be a narrow one, it is nevertheless an important one for employers and employees alike. The number of ADA cases filed in the federal courts has been increasing in past years. In 2004, a separate Nature of Suit code (445) was created for ADA-Employment

cases. According to PACER queries on this code, there were 828 cases filed in 2005; 961 cases filed in 2006; and 1037 cases filed in 2007. The EEOC does not report any increases in the past several years in administrative charges, but its own figures show approximately 15,000 ADA charges received each year for the past ten years.[1] *See* U.S. Equal Employment Opportunity Commission, Americans with Disabilities Act of 1990 (ADA) Charges FY1997-FY2007, http://www.eeoc.gov/stats/ada-charges.html (last visited April 18, 2008). The sheer number of cases each year potentially involving the issue raised in this Petition militates in favor of review by the Court.

In addition to the number of employees and employers affected, the issue itself has significance from various policy perspectives. As discussed above, employers could be discouraged from substantial participation in the interactive process out of fear that greater knowledge of ADA obligations increases the likelihood of punitive damages. Corporations with nationwide presence, such as Petitioner, will find it difficult to formulate policies and parameters for ADA accommodation requests when the same treatment could face different potential liability in different circuits.

---

[1] Furthermore, one independent study has estimated that only 14% of eligible ADA administrative charges became filed lawsuits, making the potential number of ADA lawsuits even higher than the actual number filed. *See* Moss, K., et al., *Prevalence and Outcomes of ADA Employment Discrimination Claims in the Federal Courts*, Mental & Phys. Disability L. Rptr., Vol. 29, p. 303 (May/June 2005).

Finally, punitive damages are more and more a particularly sensitive issue for employers. As the author of *Kolstad* recognized in a different opinion, "there is a stigma attached to an award of punitive damages that does not accompany a purely compensatory award." *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 54 (O'Connor, J., dissenting). In today's atmosphere of easy and broad access to court decisions through the internet and other means, corporations are more vulnerable to reputational harm from unwarranted punitive damages than ever. The amount of the punitive damages is not necessarily the crucial fact; it is that they were awarded at all. This Court should insure that punitive damages are considered by a jury only when the law allows—when evidence of malice or reckless indifference exists—and should not allow a diluted standard to develop within the courts.

CONCLUSION

The conflicting decisions of the courts of appeal and the inconsistency of some of those courts' opinions with the holdings of this Court necessitate review of the Fourth Circuit's opinion below. The issue is also an important one for policy reasons, and the Petition for a writ of certiorari should be granted.

Respectfully Submitted,

Edward J. Efkeman*
Federal Express Corporation
Legal Department, Litigation
3620 Hacks Cross Road
Third Floor, Building B
Memphis, TN 38125-8800
(901) 434-8555

* *Counsel of Record*

Counsel for Petitioner
Federal Express Corporation